

and thereafter the interest will be at 8% pa until realization. Costs of the proceedings are to be paid by the defendant to the plaintiffs.

Order accordingly.

Solicitors: *Rethina & Co; Shearn Delamore & Co; Drew & Napier.*

Reported by *Zarinah Marican*

Bumiputra Merchant Bankers Bhd v Supreme-QBE Insurance Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO
C23-281-86
VC GEORGE J
4 MARCH 1988

Companies and Corporations — Ultra vires — Whether defendant had power to issue letter of indemnity — Whether issue of letter of indemnity within the ordinary business of the defendant — Burden of proving letter of indemnity outside ordinary business of defendant — Companies Act 1965, ss 19(1)(c), 20(1), (2) & Third Schedule

The plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to provide bankers' guarantee on behalf of the defendant's clients from time to time. It was further agreed that any guarantees issued by the bank in favour of the defendant's customers would be 'counter-guaranteed' by the defendant, whereby the defendant guaranteed the plaintiff payment of the amounts guaranteed by the plaintiff on behalf of the defendant's customer. One such guarantee was issued by the plaintiff on behalf of the defendant's customer, Dirikon, in favour of British American. The defendant in turn issued the plaintiff with a letter of indemnity. Dirikon, in breach of its agreement with British American, failed to repay loan moneys extended by British American, and the plaintiff was called upon to honour its guarantee. The plaintiff, accordingly, paid up on the British American guarantee and in turn demanded payment from the defendant pursuant to the letter of indemnity issued by the defendant.

The plaintiff made an application under O 33 r 2 of the Rules of the High Court 1980 for certain issues to be tried as preliminary issues. The four issues were:

- (1) Whether the defendant had, by virtue of s 19(1)(c) of the Companies Act 1965, read together with the Third Schedule to the Act, power to issue the letter of indemnity in favour of the plaintiff.
- (2) Whether the defendant had power under its memorandum of association to issue the letter of indemnity.
- (3) Whether, by virtue of s 20(1) of the Companies Act 1965, the defendant's act in issuing the letter of indemnity is not valid by reason only that the defendant allegedly did not have capacity or power to issue the same.
- (4) Whether, by virtue of s 20(2) of the Companies Act 1965 and in view of the answers to (1), (2) and (3) above, the defendant is barred from asserting or relying on the matters raised in

A paras 7, 8 and 9 of its defence stating that the letter of indemnity was not in the ordinary business of the defendant.

Held, deciding the preliminary issues in favour of the plaintiff:

(1) It was unarguable that the defendant had the capacity and power to enter into the letter of indemnity as it was doing something within the ambit of its objects as set out in the memorandum of association. In any event, s 20(1) of the Companies Act 1965 abolished the effect of the ultra vires doctrine. The answer to the first three questions was in the affirmative.

(2) As regards the fourth question, the defendant could not rely on any of the exceptions under s 20(2) of the Companies Act 1965.

(3) The transaction was part of the ordinary business of the defendant and art 59(b) had no relevance for the following reasons:

- (a) the burden of proving that the transaction was not in the ordinary course of business of the defendant was on the defendant as it was asserted by the defendant and the defendant had not sought to prove that the transaction was outside the ordinary business of the defendant;
- (b) the transaction fell within the express objects of the defendant company as set out in its memorandum of association. In the absence of evidence to the contrary, those objects for which a company are established as set out in its memorandum of association set out the ordinary course of business of the company.

(4) As the disposal of the preliminary issues substantially disposed of the cause of action and renders a trial unnecessary, pursuant to O 33 r 5 of the Rules of the High Court 1980, the defendant was ordered to pay the plaintiff the amounts covered by the letter of indemnity.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 107 of 1988.]

Cases referred to

- 1 *Re Horsley & Weight Ltd* [1982] 3 All ER 1045 (refd)
- 2 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52 (refd)

Legislation referred to

Companies Act 1965 ss 19(1)(c), 20(1), (2), Third Schedule
Rules of the High Court 1980 O 33 r 2

T Thomas (Tunku Alina Raja Muhd Alias with him) for the plaintiff.

G Sri Ram (R Lazar with him) for the defendant.

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Cur Adv Vult

VC George J: By an agreement in writing dated 30 July 1980 (the 'July 1980 agreement') entered into between the plaintiff ('the bank') and the defendant ('QBE'), the bank agreed to provide at the instance of QBE bankers guarantees in favour of clients of QBE. What was envisaged was that from time to time customers of QBE would approach QBE for guarantees. QBE in turn would require the bank to provide the guarantee needed by their clients. It was agreed between the bank and QBE that any guarantee issued by the bank at the instance of QBE would be 'counter-guaranteed' by QBE — in other words QBE

guaranteed the bank payment of the amount guaranteed by the bank in the event the bank was required to and paid up on the guarantee it had issued. Apart from the consideration of the counter-guarantee provided by QBE, the bank was also to be paid a commission for issuing each guarantee. The consideration for QBE providing the bank guarantees to its customers was the taking out of a policy of insurance in respect of each such guarantee (and the payment of premium therefor) by the customer concerned, the policy presumably covering the risk covered by the guarantee. It was envisaged that the guarantees sought would vary not only in respect of the type of guarantee (but within the compass of the general heading 'To comply with tender/contract requirements') but also in respect of quantum.

By the July 1980 agreement, the bank was to provide guarantees for QBE's customers during the period 30 July 1980 to 31 July 1981, the aggregate value whereof to be within \$2m at any one time. The period of the availability of the facility was extended by agreement between the parties from time to time and on 19 December 1984, the bank informed QBE by a letter of that date that the availability of the facility, still limited to the aggregate amount of \$2m, was extended up to 30 November 1985.

It was during this extended period that by letter dated 21 March 1985, the bank wrote to QBE, again under the title 'Bankers Guarantee Facility of \$2m' (which was the title used in the initial letter granting the availability of the facility and in all the letters extending the availability of the facility) advising QBE that the bank was prepared to issue a guarantee on behalf of a customer of theirs called Dirikon Sdn Bhd ('Dirikon') in favour of British-American (M) Insurance Bhd ('British American') for \$2m. By that letter, the bank further informed QBE that the terms and conditions for the bank providing the guarantee to QBE's customer was to be on the terms obtaining, ie as set out in the July 1980 agreement save that the purpose of the facility which previously was limited 'to comply with tender/contract requirements' of QBE's customers was now extended to include 'financing requirements of QBE's clients where bankers guarantees are called for.'

On 4 April 1985, the 'Exco' of QBE (which from the submission by counsel I gathered referred to an executive committee appointed to represent the board of QBE) resolved that QBE be given the authority to accept guarantee facilities up to \$2m 'for the purpose of complying with the requirements of tender/contract, performance, advance payment bonds and other credit and financial bonds/guarantees issued by the company ...'.

On 12 April 1985, QBE required the bank to issue a guarantee on behalf of their customer Dirikon for \$500,000 (and not \$2m) and purported to reserve the utilization of the balance of the agreed facility of \$2m for other custom-

ers of QBE should there be any seeking bank guarantees. Accordingly, the bank issued a letter of guarantee dated 31 July 1985 in favour of British American. What was guaranteed was the repayment of a loan that Dirikon had been granted by British American. QBE provided a counter guarantee by issuing a letter of indemnity dated 31 July 1985 in favour of the bank.

Now, cl 3 of the memorandum of association of QBE sets out the objects for which the company was established. Inter alia, the company was established to carry on various types of insurance 'business' in all or any one or more of their respective branches. Specifically mentioned in cl 3(1) is the business of insurance against contingencies of all description or by way of guarantee or security. Clause 3(4) appears to re-emphasize this by providing as part of the objects 'generally to carry on every kind of insurance business whatsoever including all matters of business ... concerned with (inter alia) guarantee business ...'. Clause 3(19) provides among the other objects for which the company was established the object of guaranteeing 'the contracts or obligations of any person or company and to secure any such guarantee by mortgage or charge over any or all of the assets of the company'.

Now, between 5 November 1980 and 12 April 1985, there were 14 transactions that had been sought by QBE within the \$2m limit and in respect of which the bank had provided guarantees. Twelve of the guarantees were performance guarantees issued to employers of contractors in the building industry. One other was for a customer of QBE called Ronald Quay Sdn Bhd in favour of The New Straits Times Bhd. The relevant portions of that letter of guarantee issued by the bank reads:

As requested by Ronald Quay Sdn Bhd ... we hereby guarantee the sum of \$100,000 ... being media accreditation granted by you. This guarantee is effective from 23 January 1981 to 22 January 1982 and is conditional on a claim thereunder being made within two months from expiry date ...

In the back-to-back letter of indemnity issued by QBE to the bank in the Ronald Quay Sdn Bhd transaction, what was guaranteed was described thus:

In consideration of your bank having at our request agreed to issue a bankers guarantee ... in favour of The New Straits Times Bhd guaranteeing the due performance, observance and compliance by Ronald Quay Sdn Bhd ... of all covenants undertakings agreements and obligations on the part of the customer to be observed and complied with under 'against all claims damages, losses or demands made in writing by New Straits Times Bhd in connection of Advertising Bills' ...

Encik T Thomas, counsel for the plaintiffs, submitted that this transaction was not a performance guarantee but a guarantee in respect of payment of money. This appears to be so. 'Media accreditation' in the context suggests to me that Ronald Quay Sdn Bhd are an advertising agency that was recognized as such by the New Straits Times Bhd and given credit facilities in respect of advertising bills.

The guarantee given obviously was in respect of the settlement of those bills.

The one other transaction was the said letter of guarantee dated 31 July 1985 issued by the bank on behalf of QBE's customer Dirikon in favour of British American guaranteeing the repayment of a loan of \$500,000 that British American had granted to Dirikon. This was, as has been seen, covered by a back-to-back letter of indemnity also dated 31 July 1985 issued by QBE in favour of the bank.

Dirikon, in breach of its agreement with British American, failed to repay the loan (and accrued interest) to British American who accordingly called upon the bank to honour its guarantee which the bank did by paying off to British American \$532,245.55. The bank in turn demanded of QBE pursuant to the said letter of indemnity of 31 July 1985 payment of the payments they had made to British American which demand not having been met, the instant writ accompanied by a statement of claim was caused to be issued. A statement of defence was filed in respect whereof there was a reply.

After the pleadings were closed, the plaintiff moved the court under O 33 r 2 of the Rules of the High Court 1980 for some six questions or issues to be tried as preliminary issues. After hearing arguments on the application, it was ordered that four of the questions or issues be tried as preliminary issues and the trial took place on 15 and 16 February when judgment was reserved until 4 March 1988.

The four questions or issues were:

- 1 Whether the defendant (QBE) has, by virtue of s 19(1)(c) of the Companies Act 1965, read together with the Third Schedule to the Act, power to issue the letter of indemnity which it did on 31 July 1985 ('the July 1985 indemnity') in favour of the plaintiff (the bank).
- 2 Whether QBE has power under its memorandum of association to issue the July 1985 indemnity.
- 3 Whether by virtue of s 20(1) of the Companies Act 1965 QBE's act in issuing the July 1985 indemnity is not valid by reason only that QBE allegedly did not have capacity or power to issue the same.
- 4 Whether by virtue of s 20(2) of the Companies Act 1965 and in view of the answers to (1), (2) and (3) above, QBE is barred from asserting or relying on the matters raised in paras 7, 8 and 9 of QBE's defence.

Encik G Sri Ram, leading for the defendant, started off by saying that he had misgivings about the disposal of the four questions as preliminary issues. He thought that there may be issues of fact to be adjudicated upon and that as such the questions were not suitable for disposal as per the order. He appeared to be asking me to review the order to have the four questions disposed of as pre-

liminary issues. However, as things turned out, he appeared to think he need not and did not pursue with that suggestion.

The first three questions or issues, the subject of this preliminary trial, clearly deal with what has been described as substantive (as opposed to procedural) ultra vires. The first three questions in effect deal with the question whether QBE by its memorandum of association or by the provisions of the Third Schedule to the Companies Act 1965 had the capacity or power to enter into the Dirikon transaction whereby QBE provided the bank with the letter of indemnity in respect of the bank guaranteeing the repayment by Dirikon of the loan to it by British American.

Encik Sri Ram candidly conceded that QBE had the capacity and/or power to do so. Indeed, the memorandum of association and the Third Schedule make it unarguable that QBE had both the capacity and the power to enter into that and those other 13 transactions whereby they provided their customers with guarantees issued by the bank. It is also unarguable that QBE had the capacity and power to secure those guarantees by a charge over their own assets, which QBE did by providing the bank with letters of indemnity in respect of each of the guarantees issued by the bank. A company cannot act ultra vires if it does or attempts to do something which falls within the ambit of any one of the objects of the company as set out in the memorandum of association: *Re Horsley & Weight Ltd*;¹ *Rolled Steel Products (Holdings) Ltd v British Steel Corp.*² In any event, by s 20(1) of the Companies Act 1965, no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act. The section abolishes the absolute effect of the ultra vires doctrine. In the premises, the answer to each of the first three questions has to be and is in the affirmative.

That left for adjudication the issues posed by the fourth question which has reference to the effect of s 20(2) of the Companies Act 1965.

Section 20(2) of the Companies Act 1965 has the effect of somewhat watering down s 20(1), abolishment of the doctrine of ultra vires by providing that lack of capacity or power may be asserted or relied on but only:

- (a) in proceedings against the company by any member of the company or by the holder (or the trustees for the holders) of debentures;
- (b) in proceedings by the company or by any member of the company against the officers, present or past, of the company; and
- (c) in any petition by the minister to wind up the company.

In the instant case, the proceedings are against QBE brought by the bank. There is no suggestion that the bank

is a member of QBE or the holder (or trustee for the holders) of any debenture. The situation that obtains does not fall within any of the exceptions specified in s 20(1) of the Act. It follows then that the answer to the fourth question has also to be and is in the affirmative.

But that is not the end of the matter in that Encik G Sri Ram, counsel for QBE, contends by way of submission the existence of what he has described as procedural ultra vires. It was contended that the transaction involving Dirikon was one outside the ordinary course of business of QBE and as such pursuant to art 59(b) of the memorandum of association could not have been embarked upon without a resolution of the company in a general meeting.

The relevant portions of art 59 relied on for the submission are as follows:

59(b) The company and the directors shall not be entitled to enter into complete or effect any of the following transactions or things unless a resolution passed by a special majority (as hereinafter defined) of the members of the company at a general meeting has first been obtained:

- (i) any contract outside the ordinary course of business;
- (vi) the making or receiving of loans or the giving of guarantees or security;
 - (a) other than in the ordinary course of business;
 - (b) in favour of any shareholder of the company or to a company in which such shareholder holds or is beneficially entitled to 15% of its issued share capital, or voting power.

Encik Thomas concedes that the bank was aware at all relevant times of the contents of the memorandum of association of QBE and confirmed that no resolution as postulated by art 59 was ever passed in respect of the Dirikon transaction. He however contends that there was no need for such a resolution as in his submission the Dirikon transaction fell squarely within the compass of the ordinary course of business of QBE.

I pause to deal with the contention by Encik Sri Ram that the burden of proving that the Dirikon transaction was within the ordinary course of business of QBE was on the bank. Paragraphs 7 and 8 of the statement of defence show that the assertion that the transaction was not in the ordinary course of business of QBE is made by the defendant QBE and relying on that, QBE contends that the transaction is void ab initio. In my judgment, in the circumstances, the burden of proving that the transaction was not in the ordinary course of business of QBE falls on QBE in that it is trite that he who asserts must prove. There was a suggestion that because these issues are being tried as preliminary issues, the burden which otherwise would fall on the defendant shifts to the plaintiff. I am afraid that I have failed to see the logic for or any merit in the suggestion.

Now, in granting the order for disposal of the preliminary issues, directions were given for the filing of affida-

vits. Affidavits have been filed on the basis of which the parties have to be deemed to have rested their case as far as facts are concerned for the court to adjudicate on the preliminary questions or issues.

I again pause to state that while I may not review my own decisions, in an O 33 r 3 situation, if it turns out that the affidavits stating the relevant facts show that there is such a dispute as to the facts that it would not be suitable for those issues of facts to be resolved by affidavit evidence, the court may put off adjudication thereon until after a full trial of the issues.

In the instant case, the affidavits filed do not show any or any significant dispute on the facts. As to the 14 transactions, the relevant particulars whereof are before the court, I do not think very much turns on those transactions other than that all of them, including the Dirikon transaction, were intended by both parties to come within the \$2m facility made available by the bank to QBE for guarantees to be issued to QBE's customers.

The objects for which QBE was established have been examined. It seems to me beyond any doubt that the Dirikon transaction (as do the other 13 transactions) fall squarely within the terms of one or more of cl 3(1), (4) and (19) of the memorandum of association. It seems to me in the absence of evidence to the contrary, the defendants are entitled to ask the court to hold that those objects for which the company was established set out the ordinary course of business of the defendants. The burden of proving that they are not, I have already held, is on the defendant and the defendant has not even sought to prove that the Dirikon transaction was outside the ordinary course of the business of QBE. On the totality of the evidence before me, I hold that the business of insurance against contingencies of all descriptions or by way of guarantee is in the ordinary course of business of QBE; I also hold that the carrying on of every kind of insurance business connected with, inter alia, guarantee insurance is part of the ordinary business of QBE; I further hold that guaranteeing the contracts of any person or company is part of the ordinary business of QBE and the securing of such guarantees by a charge over any or all of the assets of QBE is part of the ordinary business of QBE. Accordingly, I hold that the Dirikon transaction was part of the ordinary business of QBE and, accordingly, art 59 has no relevance in respect thereof. There was no need for a resolution of the company in a general meeting and, accordingly, there was no procedural ultra vires as suggested by learned counsel for the defendants or at all.

What is left to be decided is the effect of the disposal of those preliminary issues or questions on the whole action. In my judgment, the disposal of those preliminary issues or questions substantially disposes of the case and renders the trial thereof unnecessary. Accordingly and

pursuant to O 33 r 5 of the Rules of the High Court 1980, it is my order that the defendant shall pay to the plaintiff the full amount covered by the letter of indemnity in respect of the Dirikon transaction. I adjourn the proceedings for counsel to work out the actual amount involved and to prepare a draft order for my approval.

Order accordingly.

Solicitors: *Skrine & Co; Shearn Delamore & Co.*

Reported by *Teoh Ai Lin*

Sarjit Singh Khaira v Government of the State of Sarawak & Anor

HIGH COURT (KUCHING) — CIVIL SUIT NO KG 126 OF 1989
HAIDAR J
9 FEBRUARY 1990

Civil Procedure — Writ — Striking out of writ and service — Whether no reasonable cause of action disclosed — Whether action frivolous and vexatious — Whether defendant improperly made a party — Rules of the High Court 1980, O 18 r 19(1)(a), (b), (d) & O 92 r 4 — Public Service Commission Rules 1964, rr 2 & 7

The plaintiff, a public service employee, was transferred by the second defendant to another department. He claimed to have been wrongfully dismissed from the service of the first defendant and also claimed arrears of pay. He sought a declaration that the second defendant acted wrongfully, in bad faith with ulterior motive in procuring the purported dismissal. The defendants applied to set aside the writ and service pursuant to O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980.

Held, dismissing the defendants' application:

(1) The court accepted the opinion that the senior accounting officers' scheme to which the plaintiff belonged is not a common-user scheme. If so, then the purported exercise of the power of the second defendant under General Orders 40(1) may not be applicable in this case as the plaintiff is transferred to another department.

(2) Even assuming that the plaintiff was holding a common-user post, it would appear that the only authority that could transfer the plaintiff would be the Public Service Commission by virtue of art 36(1) of the State Constitution and r 7 of the Public Service Commission Rules 1964. It is patently clear that the purported powers of transfer claimed by the second defendant under the General Orders are not delegated to him as such by the Public Service Commission which the Public Service Commission could do by virtue of the powers conferred on it by art 37(3) of the State Constitution. In that event, the General Orders cannot override the express provision of the State Constitution and the Public Service Commission Codes 1964.

(3) The court was satisfied that there was a cause of action in the case. In view of the facts disclosed and on the line of

A authority relating to an O 18 application, the court was satisfied that this action was not frivolous or vexatious or an abuse of the process of the court. The issue of facts and law in respect of the case are matters that should be properly determined at the trial proper, and this was not an obvious and clear case for which O 18 can be applied.

B (4) In respect of the alternative ground that the defendant should cease to be a party on the ground that he had been improperly or unnecessarily made a party, the action filed against the second defendant is in his personal capacity. The court was of the view that this is not a proper case for the exercise of its discretion under O 2. As to whether there has been any tort committed by the second defendant, the matters raised by both parties in their affidavits are mainly questions of fact to be decided at trial.

C [Editorial Note: The defendants have appealed to the Supreme Court vide Civil Appeal No 01-27-90.]

Cases referred to

- 1 *Zakaria bin Mohamed Esa v Dato Abdul Aziz bin Ahmad & Ors* [1985] 2 MLJ 222 (refd)
- D 2 *Stephen Kalong Ningkan v Tun Abang Haji Openg & Anor* (No 2) [1967] 1 MLJ 46 (refd)
- 3 *Wenlock v Moloney & Ors* [1965] 2 All ER 871 (refd)
- 4 *Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 (distd)
- 5 *Public Service Tribunal Judgment* (Case No 57 of 1980) (unreported) (refd)
- E 6 *Smith v East Elloe Rural District Council & Ors* [1956] AC 736 (refd)

Legislation referred to

- Federal Constitution arts 35, 36(1), 132(2)
Public Service Tribunal Act 1977 s 2
Public Service Commission Rules 1964 rr 2, 7
F Rules of the High Court 1980 O 15 r 6(2)(a), O 18 r 19(1)(a), (b), (d), O 56 r 2(2), O 92 r 4
Sarawak State Constitution art 37(3)

TO Thomas for the plaintiff.

A Hamid bin Mohd Yusof (Deputy State Attorney-General) for the first and second defendant.

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Cur Adv Vult

Haidar J: Sarjit Singh Khaira, the plaintiff, filed this writ against the government of the State of Sarawak (first defendant) and Datuk Amar Bujang Mohammed Nor, the State Secretary (second defendant) for a declaration that he was wrongfully dismissed from the public service of the first defendant and that he is entitled to arrears of pay, etc. As against the second defendant knowingly acted wrongfully in bad faith with ulterior motive in procuring his purported dismissal.

I The defendants entered conditional appearance on 5 September 1989 after obtaining leave from the court. On 6 September 1989, the defendants filed summons-in-chambers pursuant to O 18 r 19(1)(a)(b) and (d) and O 92 r 4 of the Rules of the High Court 1980 ('RHC') for an order to set aside the writ and service thereof. The grounds put forth by the defendants are: